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No. 365

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Supreme Court of the United States

OCTOBER TERM, 1942

HAZEL KRUSE, Administratrix of the Estate of Ernest Kruse, Deceased, and CARL J. HANSEN, Administrator of the Estates of George Lee, Deceased, and Andrew Lee, Deceased, *Petitioners*,

vs.

NEW ENGLAND FISH COMPANY OF OREGON, a Corporation, and NEW ENGLAND FISH COMPANY, a Corporation, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BOGLE, BOGLE & GATES and
E. G. DOBRIN,
WHITTEMORE & TRUSCOTT and
ARTHUR L. HAUGAN,
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533 Dexter Horton Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

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NEW ENGLAND FISH COMPANY OF OREGON, a Corporation, and NEW ENGLAND FISH COMPANY, a Corporation, *Respondents.*

No. 365

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION OF LOWER COURT

The opinion of the Ninth Circuit Court of Appeals is reported in 127 F.(2d) 648 (Tr. 32).

COUNTER-STATEMENT OF THE CASE

This matter originates in the District Court of the Western District of Washington, Northern Division. Respondents' fishing tender, the O. M. ARNOLD, foundered in a gale in Chatham Straits, Alaska, on August 17, 1939. Libels in personam were filed in the Washington District Court by administrators ap-

pointed in Oregon for three crew members who lost their lives, seeking damages under the Jones Act. Petition for Limitation or Exoneration of liability was filed in the Washington District Court by Respondents. The Oregon administrators, being the Petitioners herein, filed their separate answers and claims in the limitation proceeding. Exceptions challenging, among other things, the capacity and rights of the foreign personal representatives and administrators to litigate the claims in the Washington District Court were filed by these Respondents, and after continuances over many months, submission of briefs, and arguments, these exceptions were sustained by the District Court, Bowen, Judge.

A decree of dismissal was lodged, and after further continuances, briefs, and arguments, the same was entered by the District Court. The Oregon administrators, petitioners herein, had filed objections to the decree on the ground that it should authorize the substitution of Washington administrators in the claims (Tr. 21). The objections did not suggest that the words "without prejudice" should be inserted in the decree. The objections were overruled, there not being then any Washington administrators or personal representatives appointed or in existence.

The Oregon administrators appealed to the Ninth Circuit Court of Appeals. No Washington administrators or personal representatives were appointed or in existence, nor was any application made for appointment of such, until some time after the matter had been heard and decided in the Circuit Court and after the mandate had gone down to the District

Court. The Circuit Court modified the decree "to state that the dismissal is without prejudice to the filing of claims by representatives appointed in Washington" and as so modified the decree was affirmed, with costs to the appellees (Tr. 32-33).

Thereafter appellants in the Circuit Court (petitioners herein) filed a letter (Tr. 34) commenting on the court's Opinion, and a motion to set aside Taxation of Costs and retax same in their favor (Tr. 38). The motions were denied without hearing or oral argument thereon (Tr. 43). Court Rule 25 of the Ninth Circuit provides for petitions for rehearing, but no such petition was filed within the allotted thirty days or at all.

SUMMARY OF ARGUMENT

I.

Application for certiorari is not timely made. Decree was entered below April 22, 1942, and subsequent letters and motions did not constitute a petition for rehearing so as to toll the three months period for making application for writ of certiorari.

II.

No valid reasons exist for review by writ of certiorari in this case. No conflict with other Circuits, or with applicable local decisions, or with decisions of this Court; no unsettled federal question involved and no departure from usual course of judicial proceedings. All Circuit Courts of Appeals which have passed on the question of capacity of foreign administrators have decided the question in accord with the decision below in the Ninth Circuit. There is a long line of

decisions by this Supreme Court determining the question, which the other courts have followed. Cases cited by petitioners from federal district courts in Maryland, New Jersey and Virginia distinguished, and in any event these are overruled by later decision on same question in Fourth Circuit Court of Appeals, whose jurisdiction embraces the Maryland and Virginia districts.

III.

Questions of substitution of parties and taxation of costs involve matters not of right, but of discretion in the lower courts; no abuse shown, but in fact these questions were decided in accord with prevailing rules, having regard to the circumstances of this case, and in accord with Ninth Circuit Rules of Court.

ARGUMENT

I.

PETITION FOR CERTIORARI NOT TIMELY

The act of February 13, 1925, Sec. 8 (28 U.S.C.A. Sec. 350) provides:

> "No appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefore be duly made within three months after the entry of such judgment or decree * * *."

The opinion and decree of the Circuit Court of Appeals were filed and recorded April 22, 1942 (Tr. 31-33). April 27, 1942, Proctors for Appellant wrote a letter to the clerk of that court commenting upon the opinion (Tr. 34), to which Proctors for Appellees replied by letter dated April 29, 1942 (Tr. 35). Both parties to the appeal filed their respective bills of costs on May 4, 1942 (Tr. 36-37).

On May 20, 1942, Appellants filed a motion for extension of time in which to file petition for rehearing or modification of opinion and judgment, and objections to the taxing of costs (Tr. 37). Order denying that motion was entered by the Court May 20, 1942. On May 22, 1942, there was filed an instrument entitled "Appellant's Objections to Taxation of Costs" (Tr. 38). No request was made therein, or at any time, for a rehearing of the case on the merits, or for further argument, and no further hearing or argument was entertained in the cause.

On this petition for certiorari, petitioners claim that

their last mentioned objections to taxation of costs, filed in the Circuit Court of Appeals, was in effect a petition for rehearing, and as such suspended running of the time within which to seek certiorari. The motion was combined with a short argument and citation of authorities as to costs, but we call attention to the language of the motion itself (Tr. 38), and its prayer:

> "Wherefore appellants pray that taxation of the costs by the clerk in favor of the appellees be set aside and costs retaxed in favor of appellants.
>
> Wm. P. Lord,
>
> of Proctors for Appellants."

May 28, 1942, Appellees filed a memorandum in reply, on the question of taxation of costs only (Tr. 41).

On June 2, 1942, without hearing or oral argument, the Circuit Court of Appeals entered its order denying Appellants' motion (Tr. 43) referring to same as a motion "to amend decree and for retaxation of costs."

We believe it is quite clear that the Circuit Court did not regard or entertain Appellant's letter or motions as being a petition for rehearing of the merits, or for a change in the court's decision on the merits. The motion did not conform in substance, much less in form, to the requirements of the Ninth Circuit Court Rules. Rule 25 thereof provides for rehearings, thus:

> "A petition for rehearing may be presented within 30 days after judgment. It must be printed and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded and that it is not

interposed for delay. Twenty printed copies must be filed with the clerk of this court."

Appellants filed merely a single typewritten copy of their motions, without any certificate. Motions for the retaxation of costs do not rise to the dignity or effect of a petition for rehearing. While the decree directed taxing of costs in favor of Appellees, the amount was not stated in or a part of the decree or judgment, and the taxing was merely a ministerial function of the clerk. Controversies thereover do not suspend or affect the judgment, nor go to the merits of the cause.

> "In any event, however, retaxation of costs does not alter the judgment as originally entered, and hence does not operate to postpone or extend the time for taking or perfecting an appeal from such judgment."
>
> 4 C.J.S. 901 (Sec. 440), citing among other cases:
>
> *Kearney v. Chicago, etc., R. Co.* (Minn.) 111 N.W. 923;
>
> *Wadhams v. Allen* (Ore.) 78 Pac. 362.

On this question, petitioners cite one case, *Bowman v. Loperena*, 311 U. S. 262. In that case a petition for rehearing was actually filed, but not timely. The lower court nevertheless granted the petition, and a rehearing was actually held on the merits. That decision adds nothing to and detracts nothing from the former rule that such a rehearing actually held *on the merits* does suspend the time for appeal.

In *Morse v. United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. ed. 518 (1926), Chief Justice Taft said:

> "There is no doubt under the decisions and

> practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a Court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the motion or petition. (citing cases) The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, depends upon the *due and seasonable* filing of the motion for a new trial or the petition for rehearing." (Italics ours)

In *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. ed. 557 (1937), this Court said:

> "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

In the latter case the appeal was held timely taken, because the lower court did entertain a rehearing on the merits, as the opinion thus further points out:

> "The original, the amended, and the supplemental petitions were considered upon the merits, and the court made findings and announced conclusions of the law with respect thereto."

We submit that the three-months' period in which certiorari might be applied for commenced to run May 22, 1942, when the decree was entered, and not June 2, 1942, when the motions were denied; and therefore

the time expired ~~August~~ July 22, 1942. The petition for certiorari herein was not filed until September 1, 1942.

II.

NO VALID REASON FOR REVIEW ON WRIT OF CERTIORARI EXISTS IN THIS CASE

Finding it difficult to form a synopsis of the petition for writ of certiorari herein and petitioners' brief thereon, we will be guided in this argument by Rule 38 of this Court, Subdivision 5(b), and consider whether any reasons exist of the character therein indicated, to call for review on writ of certiorari in this case.

A. No Conflict With Other Circuits

The two propositions decided by the District Court, from which appeal was taken to the Circuit Court of Appeals, and there affirmed, were as follows:

1. That foreign administrators lacked capacity and right to answer and contest the petition for limitation and to prosecute claims in the limitation proceedings in the District Court of Washington.
2. In therefore dismissing the answers and claims of the foreign administrators, the court would not order substitution of non-existent Washington administrators as claimants, no application having been made for appointment of such.

As shown by memorandum opinion filed by the District Court (Tr. 19) (not reported), the District Court in deciding these propositions followed the established rule of the Ninth Circuit laid down in *The*

Princess Sophia, 35 F.(2d) 736; rehearing denied 36 F.(2d) 591; affirmed 61 F.(2d) 339, at 354 (1932). The authority and reasoning upon which the Ninth Circuit rule was adopted in that case, will be found in the original District Court opinion (35 F.(2d) 736) and the opinion on rehearing in the District Court (36 F.(2d) 591), which were approved without much comment in the Circuit Court opinion (61 F.(2d) 339). The first of these opinions cited the rule of this Court (*Dennick v. R. R. Co.*, 103 U.S. 11, 26 L. ed. 439), and reasoned essentially as follows on the question of capacity:

> "To present a valid claim, the representative capacity must be established. Issuance of letters testamentary must be shown, and, if issued in another state, to have extra-territorial force, the right must be conferred by statute. The Washington statute confers no such right, and the State Court does not recognize the personal representative of a deceased person from another state."

And in the rehearing opinion the District Court, on the question of substitution, reasoned thus:

> "* * * but the court has not jurisdiction of the claimant until he appears and presents his claim. Equity in admiralty may not be administered until claimant appears and states the facts substantially as in a libel showing prima facie right of recovery."

Petitioners herein do not cite any Circuit Court of Appeals decision contrary to the Ninth Circuit rule which was followed in this case, and we submit that there are no contra decisions in any of the Circuit

Courts of Appeal. On the contrary, at least three other Circuits have announced the same rule as our Ninth Circuit.

The Fifth Circuit Court of Appeals in *Robinson v. First National Bank of Plainview*, 55 F.(2d) 209, held:

> "The rule is well settled that letters testamentary will not support a suit in another state in either a state or federal court, unless by force of some law of the forum."

The Sixth Circuit expressed it in *Maysville, Etc. Co. v. Marvin*, 59 Fed. 91, wherein the headnote reads:

> "An act giving the personal representative a right of action for the wrongful death of his deceased * * * will not be construed to confer such right upon a foreign administrator, contrary to the Common Law rule and the established policy of the state."

The Fourth Circuit Court of Appeals established the rule in 1940 after rejecting the views of two district courts in that Circuit which are here relied on by petitioners. *Ryholt v. Jarrett* (4 C.C.A.—1940) 112 F.(2d) 642 (discussed further *infra* p. 18).

A case in the Second Circuit, *Middleton v. Luckenbach* (2 C.C.A.—1934) 70 F.(2d) 326, was an admiralty proceeding in New York. Our question was not in issue there, because the personal representative had taken out ancillary letters in New York, but the fact is mentioned in the opinion, and we cite the case to show the custom in admiralty courts.

B. No Conflict With Local Decisions

In the State of Washington there is no statute authorizing a foreign administrator to sue in the state, nor any provision for his doing so upon filing certified copies of his letters, as some states provide. On the contrary, the Washington Statute positively disqualifies non-residents to act therein as administrators.

Rem. Rev. Stat., Sec. 1457.

The Washington courts enforce that statute, following the prevailing rule.

Barlow v. Coggan, 1 Wash. Ter. 257;

In re Goss' Estate, 73 Wash. 330, 132 Pac. 409;

In re Rowley's Estate, 178 Wash. 460, 35 P.(2d) 34.

In the latest case, last above cited, the Washington court said:

> "Foreign administrators and executors have no standing, as such, beyond the jurisdiction of the state in which they are appointed." (citing cases)

Petitioners challenge this statement of the Washington rule, citing *Doe v. Tenino Coal and Iron Co.*, 43 Wash. 523, 86 Pac. 938. We submit that this early case is in accord with the rule. The foreign administrator who was there allowed to sue in the state courts of Washington was not maintaining the suit in his capacity as administrator, but in the capacity of a special trustee under an express trust

created by a separate written instrument. This appears from the opinion:

> "It is urged first by appellant that respondent has no capacity to sue; that he is one of the executors of the will of said John S. Doe, deceased, holding under an appointment by the court of the state of California, and consequently without authority to maintain any action as such executor in this state. We think, however, that the written instrument signed by himself and Charles F. Doe and Eleanor H. Doe, hereinbefore referred to, by virtue of which he purchased this property, has the effect of constituting the respondent the trustee of an express trust within the contemplation of Bal. Code, Sec. 4825."

As such trustee of an express trust, the plaintiff there had specific authority from the Washington Statutes to sue in that capacity only.

C. No Conflict With Decisions of This Court

In 1806, Chief Justice Marshall held that foreign administrators lacked capacity, saying:

> "The question in this case is, whether the executor of a person who dies in a foreign country, can maintain an action in this, by virtue of letters testamentary granted to him in his own country. * * *
>
> "All rights to personal property are admitted to be regulated by the laws of the country in which the testator lived; but the suits for those rights must be governed by the laws of that country in which the tribunal is placed. No man can sue in the courts of any country, whatever

his rights may be, unless in conformity with the rules prescribed by the laws of that country."

Dixon's Executors v. Ramsay's Executors, 3 Cranch 319.

The rule has been consistently and repeatedly announced by this court in many subsequent cases:

Wilkins v. Ellett, 108 U.S. 256, 27 L. ed. 78;
Johnson v. Powers, 139 U.S. 156;
Hayes v. Pratt, 147 U.S. 557;
Moore v. Mitchell, 281 U.S. 18, 74 L. ed. 673.

The recent case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, of course was concerned with a question of Common Law, but when a question in admiralty involves a right transplanted by the Jones Act from the civil courts, such as the right to sue for wrongful death, we believe the language of the *Erie* case is applicable:

"Except in matters governed by the Federal constitution or by Acts of Congress, the law to be applied in any case is the law of the State."

D. No Unsettled Question of Federal Law and No Departure From Usual Course of Judicial Proceedings

The rule of incapacity of foreign administrators is still accorded full validity in the recent Re-statement of the Law—Conflict of Laws, Secs. 396 and 507.

Beale, The Conflict of Laws (1935 ed.) Vol. 2, pages 1313 and 1315, points out that the right of foreign administrators to sue is dependent on a permissive local statute in cases under the Federal Employers' Liability Acts. The Jones Act applies these Acts to seamen.

In *Brooks v. Southern Pac. Co.* (C.C.-W.D. Ky.) 148 Fed. 986, which was an action under the Federal Employers' Liability Act, the federal Circuit Court held that a foreign administrator cannot maintain a suit under that act in the federal court in the Kentucky District in absence of authorization by the statutes of Kentucky.

This being an admiralty case, it is interesting to note that Benedict on Admiralty (6th Ed.—1940) Vol. 1, Sec. 230, page 43, says:

> "There are no special Admiralty Rules concerning the capacity of parties, whether as infants, incompetents, agents, foreign corporations, and the like. *In these matters the admiralty courts have largely followed the local State practice;* but as they are fully covered by the Federal Civil Rules, *it would seem logical for the admiralty side of the court to apply Civil Rule 17, which expresses what the admiralty practice has actually been,* namely: that actions shall be prosecuted in the name of the real party in interest; that executors, administrators, guardians, trustees of an express trust, parties who have made contracts for the benefit of another, may sue without joining their beneficiaries; that the capacity of an individual to sue or be sued is determined by the law of his domicile, and that of a corporation by the law under which it was organized; *and that in all other cases such capacity shall be determined by the law of the State in which the District Court is held;* also that infants and incompetents may act through general guardians, committees, conservators, next friend or guardian ad litem." (Italics ours)

Rule 17(b), Federal Rules of Civil Procedure, provides as stated in the foregoing quotation from Benedict. Benedict's statement that Rule 17 should govern in admiralty is highly persuasive when we bear in mind that in admiralty, as in the common law, there was no right of action for wrongful death; that the Jones Act (46 U.S.C.A., Sec. 688) in creating such a statutory right of action expressly subjects it to the statutes "conferring or regulating" the similar right of action in the Civil Courts, *i.e.*, the Federal Employers' Liability Act (45 U.S.C.A., Sec. 51). It seems the evident intent of the Jones Act to engraft into the admiralty not only the civil right, but also the civil regulation thereof. In our case, the action of the courts below conforms to Rule 17, adopted pursuant to statutory authorization.

E. Petitioners' Cases

Attempting to show a conflict in the authorities, or an unsettled state of the law needing to be resolved, petitioners cite (Pet. 15, Br. 8) four generalized texts, four decisions of United States District Courts (two from Maryland), one state decision from Mississippi, and three state decisions from Missouri, on the question of capacity of foreign administrators. These are the cases that were relied on by petitioners below. No conflicting decisions from any Circuit Court of Appeals or this Court are cited. And we submit that an analysis of the cases cited fails to show an existing conflict.

Pan Two, 26 F. Supp. 990, 1939 A.M.C. 501, is heavily leaned upon by petitioners (Br. 12). It is a decision by Judge Chesnut of the United States Dis-

trict Court in Maryland, and is mentioned in some of the cited texts as creating a conflict in the authorities. We submit this is based upon an incomplete analysis of the case. It is true that Judge Chesnut discourses at length upon the theory that the administrator in cases like this is a mere trustee for certain beneficiaries, hence the general rule should not apply. But upon scrutiny, the opinion discloses that there had been a change in the statute of Maryland, *and the statute was interpreted as permitting suit by foreign adminisrators in the Maryland state court.* Obviously this renders the result of that case correct under the prevailing rule above discussed, and we submit this is the real basis upon which the decision rests, regardless of the dicta.

Rose v. Phillips Packing Company, 21 F. Supp. 485, is another decision by District Judge Chesnut in the same Maryland district. It was neither an admiralty nor a railway case, but arose in Federal Court because of diversity of citizenship. When the foreign administrator's capacity was challenged, he took out ancillary letters in Maryland, and was substituted as a Maryland administrator. In view of that fact, and the Court's interpretation of Maryland law as permitting suit by foreign administrators, the case cannot be said to create a conflict.

Kirincich v. Standard D. Co., 27 F. Supp. 219, is a decision of the District Court in New Jersey. Again, the same situation prevails, the New Jersey statutes and courts having authorized suits by foreign administrators in that state; hence there is no conflict with the prevailing rule.

Pearson v. Norfolk, etc., R. Co., 286 Fed. 429, is the only other federal case cited by petitioners, and is from the District Court of Virginia. It was a railway case. While the case might be distinguished in some respects, we may concede that it is out of harmony with the general rule. It is cited with approval by Judge Chesnut in *Pan Two, supra.*

However, it is hardly necessary for this Court to resolve any doubt created either by the *Pearson* case or by *Pan Two.* In the first place, these are isolated cases, and in the second place, that duty has been admirably performed already by the Fourth Circuit Court of Appeals.

Ryholt v. Jarrett (1940) 112 F.(2d) 642, *supra.*

The Fourth Circuit Court in the *Ryholt* case frankly stated that it disliked the rule denying foreign administrators the right to sue in states where not authorized, when acting as trustees for certain beneficiaries, but found that the established rules of law required it to hold foreign administrators disqualified in all cases where they are not extended recognition by the local law and practice. The basic unsoundness of the *Pearson* case and of the obiter reasoning in *Pan Two* is strikingly exposed, and since those two cases from Virginia and Maryland arose in districts under the jurisdiction of the Fourth Circuit Court of Appeals, it would seem that any conflict or uncertainty created by those cases, has been effectually resolved by the *Ryholt* case, in harmony with the rule of the other Circuits and of this Court.

The state court decisions cited by petitioners, one

from Mississippi, and three from Missouri (Pet. 15, Br. 8)—

Gulf M. & N. R. Co. v. Wood (Miss.) 146 So. 298;

DeMattei v. Missouri, etc., R. Co. (Mo.) 139 S.W.(2d) 504;

Wells v. Davis (Mo.) 261 S.W. 58;

Shaw v. Chicago, etc., R. Co. (Mo.) 282 S.W. 416—

hardly need analysis or comment, because when the court of last appeal in any state holds that foreign administrators have the right to sue in the courts of their state, then ipso facto such becomes the law of that state, and a federal court sitting therein would follow that rule, both on the Civil and Admiralty side, in accord with the prevailing rule we have discussed. We need merely point out that the Washington Court, in accord with the Washington statutes, has held to the contrary as to the capacity of foreign administrators.

III.

SUBSTITUTION PROPERLY DENIED; COSTS PROPERLY TAXED

A. Question of Substitution

Petitioners made no formal application for substitution of Washington administrators in the courts below. They raised the question obliquely in their "Objections to Form of Decree" filed in the District Court (Tr. 21). That was after exceptions had been sustained. Such a request is not a matter of right; it is addressed purely to the court's discretion. A principal reason for denying it was that there were not then in existence any Washington administrators, nor had

application been made for appointment of such, nor was any showing made that it would be done. The same situation prevailed when the case was heard and decided in the Circuit Court of Appeals. Another reason for denying the request was that a substitution would not have been a mere change of capacity in which the former claimants would continue the claim, but since they were non-residents, disqualified to seek appointment in Washington, it would have meant a complete change of parties on one side of the case.

In all the cases cited by petitioners on this question, including *Missouri, etc., R. Co. v. Wulf*, 226 U.S. 570, and *U. S. v. Powell*, 93 F.(2d) 788 (Br. 26), and the other cases cited, where substitution was allowed, there was no such radical change as a complete substitution of parties on one side of the case; the original party plaintiff was merely allowed to continue the action in the additional or substituted *capacity* of administrator. Even then, none of the cases hold that this is a matter of right; all of them recognize it is a matter of the court's discretion in the particular circumstances involved.

2 C.J.S. 208 states:

> "Although, in a proper case, one claimant may be substituted for another in admiralty proceedings, such substitution cannot be permitted where claimant to be substituted does not submit to the jurisdiction of the court."

Citing:

The Eliza Lines (C.C.D. Mass.) 61 Fed. 308.

See also:

Brooks v. Boston and N. R. Co. (Mass. 1912) 97 N.E. 760;

Vaughan v. St. Louis, etc., R. Co. (Mo. 1914) 164 S.W. 144;

The Princess Sophia, supra, 36 F.(2d) 591, at 594.

39 Am. Jur. 972, Sec. 101, states the rule:

> "In all cases, in fact, the question of substitution of parties is generally one within the sound discretion of the court to determine, in the light of the exigencies of each case, and in accordance with the recognized legal and equitable principles, but substitution may not be made where to do so would contravene the statutory provisions upon this point."

B. Question of Costs

Petitioners cite no cases in point upon their argument that allowance of costs to appellees in the Circuit Court of Appeals was arbitrary. Rule 27 of the present Rules of the Ninth Circuit Court of Appeals provides:

> 2. "In all cases of affirmance of any judgment or decree in this court costs shall be allowed to the appellee, unless otherwise ordered by the court."

As pointed out in appellees' memorandum (Tr. 41) in the Circuit of Appeals on the question of costs, the decision and decree there affirmed the district court on both of the questions involved in the appeal, and the modification to insert "without prejudice" was one of form only. There, as here, petitioners argued earnestly that the decree in the district court would operate as res judicata, barring any further claim. Neither the District Court nor these respond-

ents ever suggested or contended so (Tr. 35, 41). The dismissal below was not on the merits, but for incapacity of the parties, hence could not possibly be with prejudice or res judicata upon claims presented by proper parties. The cases cited by petitioners, such as *Chicago etc. R. Co. v. Schendel*, 270 U.S. 611, are all cases where hearings had been held on the merits, resulting in res judicata.

We submit that the allowance of costs to appellees in the Circuit Court of Appeals, upon affirmance with a modification of form only which was never resisted, nor requested in the District Court, is entirely in accord with the prevailing rules and practice. It again is a matter of discretion in the lower court, under its Court Rule 27, *supra*, and no abuse thereof is shown.

CONCLUSION

We respectfully submit that petitioners application for writ of certiorari was not made in time. The three months' time began to run upon entry of the decree in the Circuit Court of Appeals on April 22, 1942. No pleading was thereafter filed complying either in form or in substance with the requirements for a petition for rehearing, and no rehearing on the merits was entertained. Hence running of the time was not suspended, and it expired July 22, 1942.

We further respectfully submit that the decision in both of the lower courts is not in conflict with any other Circuit, nor with applicable local decisions, nor with decisions of this Court; that there is no unsettled question of federal law involved, nor any departure

from the usual course of judicial proceedings. On the contrary, the decision in both lower courts and on all points is in full accord with the other Circuits and with a long line of decisions of this Honorable Court, and follows the rules prevailing throughout the United States; that there are no dissenting decisions which have not already been overruled by the Court of Appeals of the Circuit where they arose.

Therefore we submit that no valid reason exists calling for a review by writ of certiorari in this case, and that the petition for same should not be entertained or granted.

Respectfully submitted,

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